No. 17-1625

IN THE
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,

Petitioners,

v.

ORACLE USA INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

BLAINE H. EVANSON
JOSEPH A. GORMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
BEvanson@gibsondunn.com

MARK A. PERRY
Counsel of Record
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONERS 1

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED 2

II. THE DECISION BELOW IS WRONG 4

III. THIS CASE IS THE IDEAL VEHICLE FOR ANSWERING THE QUESTION PRESENTED 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975) 1, 5, 8, 10

Arlington Cent. Sch. Dist. Bd. of Educ. v. *Murphy*, 548 U.S. 291 (2006) 4, 5, 6

Artisan Contractors Ass'n of Am., Inc. v. *Frontier Ins. Co.*, 275 F.3d 1038 (11th Cir. 2001) 2

The Baltimore, 75 U.S. 377 (1869) 8

Binns v. *Woodruff*, 3 F. Cas. 421 (C.C.D. Pa. 1821) 7

Blunt v. *Patten*, 3 F. Cas. 763 (C.C.S.D.N.Y. 1828) 7

BMG Rights Mgmt. (US) LLC v. *Cox Commc'ns, Inc.*, 881 F.3d 293 (4th Cir. 2018) 10

Bridgeport Music, Inc. v. *Diamond Time, Ltd.*, 371 F.3d 883 (6th Cir. 2004) 2

Byrd v. *United States*, 138 S. Ct. 1518 (2018) 3

Coles v. *Wonder*, 283 F.3d 798 (6th Cir. 2002) 2

Comm'r v. *McCoy*, 484 U.S. 3 (1987) 3

In re Costs in Civil Cases,
30 F. Cas. 1058 (C.C.S.D.N.Y. 1852) 7

Crawford Fitting Co. v. *J.T. Gibbons, Inc.*,
482 U.S. 437 (1987) 1, 5, 10

CRST Van Expedited, Inc. v. *EEOC*,
136 S. Ct. 1642 (2016) 6

Fogerty v. *Fantasy, Inc.*,
510 U.S. 517 (1994) 1, 6, 9

Hathaway v. *Roach*,
11 F. Cas. 818 (C.C.D. Mass. 1846) 7, 8

Henkel v. *Chicago, St. P., M. & O. Ry. Co.*,
284 U.S. 444 (1932) 8

InvesSys, Inc. v. *McGraw-Hill Cos.*,
369 F.3d 16 (1st Cir. 2004) 2

Kirtsaeng v. *John Wiley & Sons, Inc.*,
136 S. Ct. 1979 (2016) 3, 9

Lightfoot v. *Cedant Mortg. Corp.*,
137 S. Ct. 553 (2017) 3

Lynce v. *Mathis*,
519 U.S. 433 (1997) 3

Natkwest, Inc. v. *Iancu*,
--- F.3d ---, 2018 WL 3596124
(Fed. Cir. July 27, 2018) 7

Petrella v. *Metro-Goldwyn-Mayer, Inc.*,
134 S. Ct. 1962 (2014) 1

Pinkham v. *Camex, Inc.*,
84 F.3d 292 (8th Cir. 1996) 2, 4

Rensselaer & Saratoga R.R. Co. v. *Davis*,
55 N.Y. 145 (1873) 8

Taniguchi v. *Kan Pac. Saipan, Ltd.*,
566 U.S. 560 (2012) 1, 5, 10

Twentieth Century Fox Film Corp. v. *Entm't Distrib.*,
429 F.3d 869 (9th Cir. 2005) 2

Zotos v. *Lindbergh Sch. Dist.*,
121 F.3d 356 (8th Cir. 1997) 2

Statutes

5 U.S.C. § 504(b)(1)(A) 5

10 U.S.C. § 2409(c)(1) 5

11 U.S.C. § 363(n) 5

12 U.S.C. § 1464(d)(1)(B)(vii) 5

12 U.S.C. § 1786(p) 5

12 U.S.C. § 50056(b)(2)(B) 5

15 U.S.C. § 15 5

15 U.S.C. § 77z-1(a)(6) 5

15 U.S.C. § 1117(a) 5

15 U.S.C. § 2310(d)(2) 5

15 U.S.C. § 2805(d)(1)(C) 5

17 U.S.C. § 505 ..... 3, 4, 5, 6, 9

20 U.S.C. § 1415(i)(3)(B) 6

28 U.S.C. § 1447(c) 5

28 U.S.C. § 1920 ..... 4, 5

28 U.S.C. § 2412(d)(2)(A) 5

29 U.S.C. § 1132(g)(1) 5

29 U.S.C. § 1370(e)(1) 5

30 U.S.C. § 938(c) 6

33 U.S.C. § 1367(c) 6

35 U.S.C. § 145 ..... 6, 7

42 U.S.C. § 247d-6d(e)(9) 6

42 U.S.C. § 1988 6

42 U.S.C. § 1988(b) 6

42 U.S.C. § 1988(c) 6

Revised Statutes of New York,
ch. X, Title I (1846–1848) 8

Revised Statutes of the Commonwealth
of Mass. 1836, ch. 121 8

Rules

Fed. R. Civ. P. 54(d) 6

Other Authorities

4 *Nimmer on Copyright* § 14.09 4

6 *Patry on Copyright* § 22:221 4

10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2666 (3d ed. April 2018) 6

Cong. Globe App., 32d Cong., 2d Sess. app. 207 10

David Nimmer, *Codifying Copyright Comprehensibly*, 51 U.C.L.A. L. Rev. 1233 (2004) 9

H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909) 7

REPLY BRIEF FOR PETITIONERS

Respondents concede that five courts of appeals have decided whether non-taxable costs are awardable in copyright cases, resulting in a 3-2 circuit split. Opp. 13–15. Non-taxable costs are not available *as a matter of law* in the Eighth and Eleventh Circuits, while the same costs *may be* awarded in the First, Sixth, and Ninth Circuits. *Ibid.*

This Court has repeatedly emphasized the importance of uniform nationwide application of both the Copyright Act (*see Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014); *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 537 (1994) (Thomas, J., concurring)), and federal statutes authorizing, or not authorizing, awards of fees, costs, and expenses (*Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565 (2012); *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987); *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 251–52 (1975)). Yet, respondents ignore the lack of uniformity created by the conflict in appellate decisions.

Remarkably, respondents spend over half of their brief in opposition attempting to paint petitioners as bad actors, "[un]deserving" of review. *See* Opp. 1–10, 12–13, 22–24. This effort is legally irrelevant, since the availability *vel non* of non-taxable costs does not turn on the conduct of the litigants. It is also factually baseless, as explained below. In truth, this case is a pristine vehicle to resolve the acknowledged circuit split on whether the Copyright Act authorizes courts to award non-taxable costs, and to provide needed uniformity on this recurring and important question in copyright litigation.

I. THE COURTS OF APPEALS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED

By respondents' own account, non-taxable costs may be awarded in copyright cases in the First, Sixth, and Ninth Circuits, but are unavailable as a matter of law in identical cases in the Eighth and Eleventh Circuits. *See* Opp. 13–15. This acknowledged circuit split is set forth in a long series of published opinions culminating in the decision below. On one side are cases concluding that the Copyright Act authorizes courts to award non-taxable costs. *See* Pet. 8–10; *Twentieth Century Fox Film Corp.* v. *Entm't Distrib.*, 429 F.3d 869 (9th Cir. 2005); *InvesSys, Inc.* v. *McGraw-Hill Cos.*, 369 F.3d 16 (1st Cir. 2004); *Bridgeport Music, Inc.* v. *Diamond Time, Ltd.*, 371 F.3d 883 (6th Cir. 2004); *Coles* v. *Wonder*, 283 F.3d 798 (6th Cir. 2002). On the other side are cases concluding the exact opposite. *See* Pet. 7–9 & n.3; *Artisan Contractors Ass'n of Am., Inc.* v. *Frontier Ins. Co.*, 275 F.3d 1038 (11th Cir. 2001); *Pinkham* v. *Camex, Inc.*, 84 F.3d 292 (8th Cir. 1996) (per curiam); *see also Zotos* v. *Lindbergh Sch. Dist.*, 121 F.3d 356 (8th Cir. 1997).

Respondents *concede* that the Ninth Circuit "disagree[d]" with and "did not follow" the Eighth and Eleventh Circuits. Opp. 11, 14. Yet, despite acknowledging this entrenched circuit split, respondents unsuccessfully try to explain it away.

First, respondents call the split "shallow." Opp. 2. But they *admit* that five courts of appeals have addressed the question presented and divided 3-2 in answering it. Opp. 13–16. The next court could make it 4-2 or 3-3, but the split will remain. This established and clear division among the courts of appeals requires resolution by this Court. *See Fourth Estate Pub. Benefit Corp.* v. *Wall-Street.com, LLC*, No. 17-

571 (U.S.) (certiorari granted to resolve split between four circuits on copyright registration); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1984 & n.1 (2016) (certiorari granted to resolve split between three circuits "about how to address an application for attorney's fees" under Copyright Act).

Second, respondents call the split "stale." Opp. 2. The oldest decision on this question (*Pinkham*) was decided just over 20 years ago, but this Court routinely grants certiorari in similar circumstances (*e.g.*, *Lightfoot* v. *Cedant Mortg. Corp.*, 137 S. Ct. 553, 558 (2017)), including to review issues under 17 U.S.C. § 505 (*Kirtsaeng*, 136 S. Ct. at 1984 n.1 (split involved cases ranging from 13 to 18 years old)). More importantly, *the decision below* is of very recent vintage. The Ninth Circuit expressly followed its own approach, rejected petitioners' argument that intervening precedent from this Court established error in that approach, and declined en banc review in the face of an acknowledged circuit conflict. Pet. App. 35a, 37a. The split is thus ripe for this Court's resolution.

Third, respondents note that *Pinkham* and *Artisan Contractors* were per curiam and suggest that they "contain little reasoning in support of their results." Opp. 15. But the unsigned nature of a court of appeals' decision "carries no weight in [this Court's] decision to review the case." *Comm'r* v. *McCoy*, 484 U.S. 3, 7 (1987) (per curiam). The Court routinely grants review of circuit splits involving such decisions. *E.g.*, *Byrd* v. *United States*, 138 S. Ct. 1518, 1526 (2018); *Lightfoot*, 137 S. Ct. at 558; *Lynce* v. *Mathis*, 519 U.S. 433, 436 (1997). That is because, like *Pinkham* and *Aritisan Contractors*, they are the binding law of their respective circuits. And neither opin-

ion lacks "reasoning." Opp. 15. Each faithfully applies this Court's precedents and is no less reasoned than the Ninth Circuit's decision in *Twentieth Century Fox*. *E.g.*, *Pinkham*, 84 F.3d at 295 (applying "longstanding" "*in pari materia*" rule under *Crawford Fitting* and concluding the word "full" does not evince "congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes").

* * *

The leading copyright treatises recognize that "[c]ourts are split on whether nontaxable costs (those not listed in section 1920) may be awarded under section 505." 6 *Patry on Copyright* § 22:221; *see also* 4 *Nimmer on Copyright* § 14.09, pp. 14-312 to 14-313. District courts across the country have similarly recognized the split in appellate authority. Pet. 9–10 & nn.3–4. Respondents admit as much. Opp. 13–16. The question presented warrants review.

II. THE DECISION BELOW IS WRONG

While respondents urge the Court to deny review on the theory that the decision below is correct (Opp. 16–22), the law is clarified through affirmances as well as reversals. Thus, certiorari should be granted even assuming, *dubitante*, that the Ninth Circuit got it right. In all events, the Ninth Circuit approach is wrong.

As this Court has recognized (and as respondents ignore), "costs" is "*a term of art*" that "does not include expert fees," for instance, but is "*obviously*" a reference to "the list set out in 28 U.S.C. § 1920, the general statute governing the taxation of costs in federal court." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 302 (2006) (emphases added). The

decision below cannot be reconciled with this Court's decisions and has no basis in the Copyright Act.

1. Respondents begin from a faulty premise, calling Section 1920 a "default federal cost-shifting statute." *E.g.*, Opp. i. But Section 1920 does not authorize cost-shifting; it "defines the term 'costs'" as used in federal cost-shifting statutes and rules. *Crawford Fitting*, 482 U.S. at 441. Thus, because Congress used Sections 1920 and 1821 to "comprehensively regulate[]" the definition of costs "in the federal courts" (*Crawford Fitting*, 482 U.S. at 440; *Alyeska Pipeline*, 421 U.S. at 251–52), this Court in *Crawford Fitting* laid out a clear-statement test for analyzing *all* federal cost-shifting statutes and rules: if a party claims entitlement to litigation expenses that are not listed in Sections 1920 and 1821, then there must be "explicit statutory authority indicating that Congress intended for that sort of fee- [or cost-]shifting." *Murphy*, 548 U.S. at 295.

The Ninth Circuit's approach fails this test. The Copyright Act's authorization for "full costs" (17 U.S.C. § 505) says nothing about expert witness fees, jury consulting fees, or any of the other non-taxable costs respondents were awarded below. "Although 'costs' has an everyday meaning synonymous with 'expenses,'" federal cost-shifting statutes draw a sharp distinction between "costs," "fees," and "expenses." *Taniguchi*, 566 U.S. at 573; *see also, e.g.*, 5 U.S.C. § 504(b)(1)(A); 10 U.S.C. § 2409(c)(1); 11 U.S.C. § 363(n); 12 U.S.C. §§ 1464(d)(1)(B)(vii), 1786(p), & 50056(b)(2)(B); 15 U.S.C. §§ 15, 77z-1(a)(6), 1117(a), 2310(d)(2), & 2805(d)(1)(C); 28 U.S.C. §§ 1447(c), 2412(d)(2)(A); 29 U.S.C. §§ 1132(g)(1), 1370(e)(1); 30 U.S.C. § 938(c); 33 U.S.C. § 1367(c); 42 U.S.C.

§§ 247d-6d(e)(9), 1988(b), (c); 10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2666 (3d ed. April 2018).

Respondents' position is that *Crawford Fitting*, *Casey*, and *Murphy* are not controlling because they did not involve Section 505 of the Copyright Act. Opp. 17–19. But this Court has repeatedly emphasized that it interprets federal fee- and cost-shifting statutes "in a consistent manner," applying those constructions across-the-board. *CRST Van Expedited, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1646 (2016); *see also Fogerty*, 510 U.S. at 537 (Thomas, J., concurring in the judgment). In defending the Ninth Circuit's decision to construe the Copyright Act *differently* from all other federal statutes, respondents ignore this well-settled doctrine as well as the separation-of-powers concerns that animate it. *See* Pet. 21.

Under "the principle recognized in *Crawford Fitting*, ... no statute" or rule—not Rule 54(d), not 42 U.S.C. § 1988, not 20 U.S.C. § 1415(i)(3)(B), and not the Copyright Act—"will be construed as authorizing the taxation of" litigation expenses outside the scope of Sections 1920 and 1821 "unless the statute refers explicitly" to those categories of expenses. *Murphy*, 548 U.S. at 301. The Copyright Act does not do so.

While respondents emphasize that "'[f]ull costs' means *full* costs" (Opp. 16), the important point is that Section 505 is limited to "full *costs*." The en banc Federal Circuit recently made the same point with respect to 35 U.S.C. § 145, which provides that "[*a*]*ll* the expenses of the proceedings shall be paid by the applicant" in certain PTO cases. (Emphasis added). The court recognized that the term "expenses" bears a particular meaning in federal statutes (one distinct from "costs" and "fees"), and that even with the modifier "all," it does not include attorneys' fees. *Natkwest*,

Inc. v. *Iancu*, --- F.3d ---, 2018 WL 3596124, at *12 (Fed. Cir. July 27, 2018) (en banc). Just as "the word 'all' sheds no light on the breadth of 'expenses'" under 35 U.S.C. § 145 (*id.*), so too, the word "full" does not expand the breadth of costs available under the Copyright Act. The word *full* means that "whatever the ['costs'] are" under the Copyright Act, "[the full amount] must be paid" by the losing party. *Ibid.* Costs are defined by Sections 1920 and 1821.

2. Respondents' effort to explain the genesis of the "full costs" provision in the Copyright Act is astonishingly ahistorical.

The purpose of the "full costs" language of the 1831 Copyright Act is clear: Congress wanted copyright litigants in the circuit courts to receive their costs, even if they recovered less than $500 in damages. *See* Pet. 16–17 & n.6; Act of 1789, ch. 20, § 20, 1 Stat. 73, 83; *Hathaway* v. *Roach*, 11 F. Cas. 818, 819 (C.C.D. Mass. 1846) (Woodbury, Circuit Justice); H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909). Respondents say this "makes no sense" because "a prevailing party in a copyright case was barred from recovering any costs" prior to 1831. Opp. 21. That is incorrect. Federal courts routinely taxed costs in copyright cases prior to 1831. *E.g.*, *Blunt* v. *Patten*, 3 F. Cas. 763, 767 (C.C.S.D.N.Y. 1828) (Thompson, Circuit Justice); *Binns* v. *Woodruff*, 3 F. Cas. 421, 424 (C.C.D. Pa. 1821) (Washington, Circuit Justice). "The usage and practice of the circuit courts" was "uniformly" to tax costs "according to the fee bill of the [forum] state." *In re Costs in Civil Cases*, 30 F. Cas. 1058, 1059 (C.C.S.D.N.Y. 1852) (Nelson, Circuit Justice); *see also The Baltimore*, 75 U.S. 377, 390-91 (1869). But the $500-threshold for cost recovery still applied in circuit courts until Congress eliminated it in 1831.

Respondents postulate that the 1831 Act "reinstate[d] the default *state* rule, under which prevailing copyright litigants received *all* of their costs, not just a subset." Opp. 21–22. That unsupported contention is inconsistent with history.

When state courts "award[ed] full costs" it was "at the rates prescribed by the Code" (*Rensselaer & Saratoga R.R. Co.* v. *Davis*, 55 N.Y. 145, 149 (1873)), and only "for services mentioned in [the] act" (Revised Statutes of New York, ch. X, Title I, § 7.1 (1846–1848) (enacted in 1830))—*i.e.*, the full amount of enumerated costs at enumerated rates. That is why statutes often provided for "full costs," "double costs," or "one quarter" costs (Revised Statutes of the Commonwealth of Mass. 1836, ch. 121, §§ 4, 8, 18 (enacted 1795)), and why "[a]ll parties recovering costs in civil causes" were entitled to, at most, the full rate for listed costs (*id.* § 32).

Accordingly, if the state statute did not list a category of expense, such as expert fees, a court could not award it. *E.g.*, *Hathaway*, 11 F. Cas. at 820 ("I am not aware [of] any courts" that awarded fees for "experts and men of science" without "express [statutory] provision" in England or the United States.); *see also Henkel* v. *Chicago, St. P., M. & O. Ry. Co.*, 284 U.S. 444, 446 (1932).

Weary of the disuniformity among state statutes, Congress passed the Fee Act. *See Alyeska Pipeline*, 421 U.S. at 247–50 & n.19. Thus, when the Copyright Act says "full costs," it means the full amount of enumerated costs at enumerated rates under Sections 1920 and 1821.

III. This Case Is The Ideal Vehicle For Answering The Question Presented

This case presents the ideal opportunity to resolve an entrenched circuit split on an important and recurring federal question in copyright law. Nothing respondents say changes that reality.

First, respondents admit that "attorneys' fees, interest, and other post-judgment issues" "regularly" merit this Court's review. Opp. 23–24; *see also Kirtsaeng*, 136 S. Ct. at 1984; *Fogerty*, 510 U.S. at 521 (granting certiorari "to address an important area of federal law," *i.e.*, the "standard for awarding attorneys' fees under § 505"). That is because the issue is "nationally significant." David Nimmer, *Codifying Copyright Comprehensibly*, 51 U.C.L.A. L. Rev. 1233, 1286-88 & Tbl. A (2004). And, contrary to respondents' half-hearted assertion (Opp. 22), the absence of *amicus curiae* briefs at this stage does not mean this issue is unimportant, as demonstrated by the numerous cases on this term's docket that lacked such briefs at the certiorari stage. *E.g.*, *Mt. Lemmon Fire Dist.* v. *Guido*, No. 17-587; *Lorenzo* v. *SEC*, No. 17-1077; *Nutraceutical Corp.* v. *Lambert*, No. 17-1094. Once the Court grants certiorari, there will be ample opportunity for *amici* to weigh in on both sides.

Second, the question presented is recurring. *See* Pet. 9, 19–20 & nn. 3–4, 7–8. Respondents contradict themselves when they simultaneously argue that the issue *might* not be recurring (Opp. 24), while at the same time insisting that "it should not take long for a more suitable vehicle to come along" (Opp. 23). The truth is that this issue arises in virtually every copyright case, but it frequently escapes appellate review, let alone this Court's review. Pet. 9–10 & nn.3–4, 19–

20 & nn. 7–8, 22; *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 301 n.1 (4th Cir. 2018).

Third, respondents are conspicuously silent on the importance of national uniformity. Congress has explicitly condemned a taxable costs regime in which "[o]ne system prevails in one district, and a totally different one in another." Cong. Globe App., 32d Cong., 2d Sess. app. 207; *see also Alyeska Pipeline*, 421 U.S. at 247–50 & n.19; *Crawford Fitting*, 482 U.S. at 439; *Taniguchi*, 566 U.S. at 565. Yet, respondents do not contest that staggering non-taxable cost awards are *routine* in the Ninth Circuit but entirely unavailable in other jurisdictions. Pet. 20.

Finally, in a transparent effort to distract the Court's attention from the glaring circuit split on the meaning of an important statutory provision, respondents fill their brief in opposition with a litany of accusations directed at Rimini and its CEO, Seth Ravin, of "lying under oath," "egregious" behavior, "fake customer[s]," "[un]ambiguous" infringement, and "false[] represent[ations]." Opp. 1–10, 22–24. But this false narrative was rejected by the jury and the Ninth Circuit. Rimini was exonerated by either the jury or the Ninth Circuit on every claim relating to false statements or intentional conduct. Rimini was found liable for copyright infringement, but the jury unanimously found that every instance of infringement was "innocent" (Pet. App. 81a–82a), meaning that Rimini "was not aware" and "had no reason to believe" that its conduct was unlawful (Instruction 35, No. 2:10-cv-106, Dkt. 880 at 43). And after a trial and an appeal, Mr. Ravin has been exonerated of any liability *whatsoever*. Pet. App. 26a, 78a, 84a–86a, 90a. It is beyond the pale for respondents to present as

their "Statement of the Case" factual *allegations* that have been squarely rejected in this very litigation.

More importantly, and contrary to respondents' repeated assertion, this case is not about a district court's exercise of "discretion" to award costs based on alleged misconduct (or, for that matter, any other reason). *E.g.*, Opp. i, 1, 13, 16, 23. The question presented—whether Congress has conferred authority to award non-taxable costs in copyright cases *at all*—is antecedent. Only if the First, Sixth, and Ninth Circuits are correct, as respondents assume, could the district court exercise its discretion to award non-taxable costs based on the circumstances of a particular case. But if the Eighth and Eleventh Circuits are correct, district courts have no discretion to award non-taxable costs, regardless of the circumstances. Only one of these diametrically opposed approaches can be correct under the statute. This Court should resolve the circuit split so that litigants in copyright cases are governed by the same rules regardless of where suit is filed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BLAINE H. EVANSON
JOSEPH A. GORMAN
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000
BEvanson@gibsondunn.com

MARK A. PERRY
Counsel of Record
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
MPerry@gibsondunn.com

Counsel for Petitioners

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